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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. HAKIM OJIALI DADZIE, Defendant and Appellant.	A137031 (Alameda County Super. Ct. No. C167904)

A jury convicted defendant Hakim Ojiali Dadzie of one count of second degree robbery. (Pen. Code,[1] § 211.) Following a bifurcated proceeding, the trial court found true a prior burglary conviction and sentenced defendant to six years in state prison. Defendant appeals, claiming various instructional errors, as well as sentencing error. We affirm.

I. EVIDENCE AT TRIAL

On the evening of September 16, 2011, 27-year-old Thomas Kinzer was at a poetry reading in Berkeley, where he had a glass of wine and read some of his poems. Shortly before midnight, Kinzer left to walk home. Kinzer was carrying his backpack, which contained a bottle of wine, his poetry journal, and a sweatshirt. While walking home, Kinzer stopped at Fred's Market on Telegraph Avenue. Kinzer saw defendant outside Fred's and recognized him as a person Kinzer had previously observed panhandling in the area.

[1] All further undesignated statutory references are to the Penal Code.

On the evening in question, Kinzer heard defendant making lewd and inappropriate comments to several young women. According to Raja Ayyad, the clerk working at Fred's, defendant was calm and was not swearing. But Ayyad did observe defendant groping the women and thought defendant seemed intoxicated. So Ayyad asked defendant to leave. Defendant was a regular customer of Ayyad's who had not previously caused any problems.

After completing his purchases, Kinzer left the market and approached defendant to warn him that Ayyad was probably calling the police. Defendant "instantly" became "violent" and "aggressive," calling Kinzer a "rich white boy" and using "the 'F' word." Kinzer was confused by defendant's response and began backing away. Defendant suddenly snatched Kinzer's backpack from his hand. But Kinzer snatched the backpack right back. Defendant only had the backpack for about a second. Defendant then hit Kinzer twice in the ribs. Kinzer was unhurt but very frightened. Kinzer ran inside Fred's to the back of the market, where he sat with his back against the cooler door.

Approximately one to two minutes later, Kinzer returned to the front of the store where he saw the "aftermath" of what appeared to be a struggle. The cash register had been moved and items that had been previously on the counter were all over the ground. Kinzer observed defendant standing outside Fred's and defendant was shouting, threatening, and cursing at Kinzer. Kinzer was terrified but did not respond or say anything to defendant. Kinzer put his backpack on the counter, but kept his hand on it because he knew defendant wanted it.

Defendant suddenly ran inside the store and used a jabbing motion to hit Kinzer, who lost his balance and fell backward but not onto the ground. Defendant grabbed the backpack and ran out of the store. Ayyad testified that he observed defendant pick up the backpack from the counter after Kinzer set it there but did not remember seeing defendant push or hit Kinzer.

Kinzer took off after defendant and chased him onto the sidewalk. Although the backpack did not contain anything valuable, Kinzer's journal did include his poems and represented a year's worth of work. About 20 to 30 feet from the market entrance,

Kinzer caught up with defendant. Kinzer pushed defendant and grabbed his backpack back. Kinzer immediately strapped the backpack to his body so that it would be more difficult for defendant to remove. Defendant approached Kinzer, punched him in the head, and fled. As a result of the punch, Kinzer fell and hit his head against a parking meter.

Ayyad called 911 and the telephone call was admitted into evidence. In the call, Ayyad said defendant knocked items off the counter, "assaulted some other dude," was "hella drunk," and was "talkin[']shit, calling everybody bitches." Ayyad told police that defendant had "assaulted some other dude," explaining that defendant "pushed and beat him up pretty bad."

Ayyad told Kinzer to wait because the police were on their way but Kinzer said he wanted to go home. Kinzer was in pain, scared, and only wanted to go lay down. Kinzer walked to People's Park, telephoned a friend, and the friend came and picked him up. Kinzer woke up the next morning sweating, shaking, and vomiting, which prompted him to seek medical attention. At the time of trial, Kinzer still suffered from a back injury and sleep problems, and had lost a significant amount of weight in connection with the incident. A few days after the incident, Kinzer gave a statement to the police and identified defendant as the assailant.

II. DISCUSSION

A. Jury Question About Meaning of "To Deprive Permanently"

Defendant contends the trial court erred in responding to the jury's request for further guidance regarding one of the elements of robbery.

1. Background

As given here, CALCRIM No. 1600 read: "The defendant is charged in Count One with robbery in violation of Penal Code section 211. To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took property that was not his own; [¶] 2. The property was taken from another person's possession and immediate presence; [¶] 3. The property was taken against that person's will; [¶] 4. The

defendant used force or fear to take the property or to prevent the person from resisting; [¶] AND [¶] 5. When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently. [¶] The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery. [¶] If you find the defendant guilty of robbery, it is robbery of the second degree. [¶] A person takes something when he or she gains possession of it and moves it some distance. The distance moved may be short. [¶] The property taken can be of any value, however slight. [¶] A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person. [¶] Fear, as used here, means fear of injury to the person himself or herself, or immediate injury to someone else present during the incident or to that person's property. [¶] Property is within a person's immediate presence if it is sufficiently within his or her physical control that he or she could keep possession of it if not prevented by force or fear. [¶] An act is done against a person's will if that person does not consent to the act. In order to consent, a person must act freely and voluntarily and know the nature of the act."

During deliberations, the jury asked: "Can you provide guidance/interpretation of the law relative to CALCRIM 1600, #5? Specifically 'to deprive permanently.' " After discussing the question with counsel, the trial court responded as follows: "You were given an instruction, CALCRIM No. 251, which require[s] proof of a union, or joint operation of act and wrongful intent. This rule means that to find defendant guilty, the jury must unanimously find that there existed wrongful intent and a wrongful physical act, which concur in the sense that the act must be motivated by the intent. The intent, which is described in CALCRIM No. 1600 #5 as the intent to 'deprive the owner of the [property] permanently,' can also be described as the intent to steal." According to the reporter's transcript, the trial court also added the following to the response quoted above: "Okay, so you must find to unanimously agree that the defendant is guilty that at the time he took the back pack he intended to steal. That's what that means."

Defense counsel objected to the trial court's response. Among other things, defense counsel questioned whether the trial court's response—defining "intent to deprive permanently" as "intent to steal"—impermissibly diluted the "permanently deprive" requirement.

2. Analysis

Defendant contends the trial court erred by failing to adequately respond to the jury's question as required by section 1138.[2] Under this section, the court is required to assist the jury during deliberations, providing guidance as to the law that applies to the case and answering pertinent questions. (See *People v. Smithey* (1999) 20 Cal.4th 936, 985.) However, a court has significant discretion to determine the level of additional guidance that may be necessary where the original instructions are themselves full and complete. (*People v. Eid* (2010) 187 Cal.App.4th 859, 882, citing *People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Preliminarily, we note that CALCRIM No. 1600 as read to the jury correctly articulated the law of robbery. The narrow issue is whether the court abused its discretion in providing additional guidance in responding to the jury's question about the meaning of the phrase "permanently deprive." We find no such abuse of discretion.

"In California, robbery is defined as 'the felonious taking of personal property in the possession of another . . . , from his person or immediate presence, and against his will, accomplished by means of force or fear.' (§ 211.) *Theft and robbery have the same felonious taking element, which is the intent to steal, or to feloniously deprive the owner permanently of his or her property.* (*People v. Montoya* (2004) 33 Cal.4th 1031, 1037.)" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1117, italics added.) It is well-established that " '[r]obbery is larceny with the aggravating circumstances that "the

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[2] Section 1138 provides as follows: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

property is taken from the person or presence of another" and "is accomplished by the use of force or by putting the victim in fear of injury." [Citation.]' (*People v. Anderson* (2011) 51 Cal.4th 989, 994 . . . .) While the larceny statute (§ 484) does not set forth the intent required, our Supreme Court has long held the crime to require a specific intent to steal, i.e., 'to deprive the owner of the property *permanently*.' (*People v. Brown* (1894) 105 Cal. 66, 69 . . . ; *People v. Kunkin* (1973) 9 Cal.3d 245, 251 . . . .) This specific intent requirement is 'part of the common law of larceny of which . . . section 484 is declaratory.' (*People v. Davis* (1998) 19 Cal.4th 301, 318, fn. 15 . . . .) For purposes of larceny, the intent to steal 'must exist at the time of the taking and carrying away.' (*People v. Turner* (1968) 267 Cal.App.2d 440, 444 . . . ; see § 20 ['In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence'].) And while the robbery statute similarly does not set forth the intent required, this crime also requires a specific intent to steal, which must exist at the time of the act of force or intimidation used to accomplish the taking and carrying away. (*People v. Anderson*, *supra*, 51 Cal.4th at p. 994; *People v. Huggins* (2006) 38 Cal.4th 175, 214 . . . .) This too is part of the common law of robbery, of which section 211 is declaratory. (See *People v. Gomez* (2008) 43 Cal.4th 249, 254, fn. 2 . . . .) [¶] Thus, robbery has been described as 'a combination of assault and larceny.' (2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Property, § 85, p. 118.) In order to constitute robbery, both the assault and the larceny must have been done with the specific intent to steal." (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1540–1541, some italics omitted.)

Contrary to defendant's contention, the trial court's reference to an "intent to steal" did not "impermissibly dilute[ ]" the "permanently deprive" requirement. Rather, the court's explanation was consistent with established law regarding the elements of robbery and was entirely appropriate in the instant case.

B. Failure to Give Unanimity Instruction

Defendant contends the trial court erred in refusing to give a unanimity instruction. In refusing to give a unanimity instruction, the trial court determined that the circumstances reflected a continuous transaction.

A criminal defendant has a fundamental right to a unanimous verdict. This requirement of unanimity " 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Thus, when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes, or the court must instruct the jury sua sponte that it must agree on the same criminal act. (*People v. Davis* (2005) 36 Cal.4th 510, 561; *People v. Russo*, 25 Cal.4th at p. 1132.) "A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses." (*People v. Maury* (2003) 30 Cal.4th 342, 422.) "On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.]" (*People v. Russo*, 25 Cal.4th at p. 1132.) No unanimity instruction is required where defendant's actions were part of "a continuous course of conduct, whose acts were so closely connected in time as to form part of one transaction." (*People v. Maury*, 30 Cal.4th at p. 423; see *People v. Diedrich* (1982) 31 Cal.3d 263, 281–282.)

There was no need for a unanimity instruction under the facts and circumstances of this case. As the jury was instructed, robbery requires proof that (1) defendant took property that was not his own; (2) the property was taken from another person's possession and immediate presence; (3) the property was taken against that person's will; (4) defendant used force or fear to take the property or to prevent the person from resisting; and (5) when defendant used force or fear to take the property, he intended to deprive the owner of it permanently. (CALCRIM No. 1600.) Defendant argues that because there was evidence of more than one discrete event—that is, the snatching of the

backpack outside the market and "the inside-the-market taking," the jury should have been instructed with a unanimity instruction. To the contrary, no unanimity instruction was necessary because, although the victim testified that defendant twice took his backpack from him, the takings during a use of force were so closely connected as to form a single act of robbery. (*People v. Curry* (2007) 158 Cal.App.4th 766, 782 [where taking of two items "occurred almost simultaneously" during assault, no unanimity instruction required because takings "so closely connected that they formed a single incident of robbery"]; see *People v. Maury, supra,* 30 Cal.4th at p. 423.) Defendant's reliance on *People v. Hernandez* (2013) 217 Cal.App.4th 559 is misplaced because it involved two separate and distinct acts of firearm possession: the incident at his girlfriend's house where he was alleged to have fired a firearm, and the incident later in the evening in which a search of a car connected to defendant revealed a fully loaded firearm hidden under the car's hood. (*Id.* at pp. 563–566, 571.)

People v. Melhado (1998) 60 Cal.App.4th 1529, upon which defendant relies, also is distinguishable because it involved two separate criminal threats over two hours apart against the same person, in the same location. (*People v. Melhado*, at p. 1539.) There, each incident could have been charged as a separate offense, yet the matter went to the jury only on one such offense. (*Ibid.*) Inasmuch as the prosecution's election was never clearly communicated to the jury, our colleagues in Division Three of this judicial district held that the trial court should have instructed on unanimity. (*Ibid.*) In so ruling, the court explained that "[t]o hold otherwise would leave open the door to allowing a prosecutor's artful argument to replace careful instruction." (*Ibid.*) Here, however, there was no such danger. The defense as to the entire robbery was that although defendant may have engaged in aggressive or assaultive behavior, there was no evidence that the "intent behind that aggressive behavior was to permanently remove . . . Kinzer's backpack from him." Rather, defense counsel argued that the evidence suggested that the reason defendant took Kinzer's backpack was "to taunt . . . Kinzer, to provoke him, to humiliate him, to make him scramble to get it back." Because the jury "could only accept or reject the defense in toto," a unanimity instruction was unnecessary. (*People v.*

Gonzalez (1983) 141 Cal.App.3d 786, 792, disapproved on other grounds in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330.)

C. Failure to Give Instruction on Lesser Included Offense of Theft

Defendant contends it was prejudicial error not to instruct on theft as a lesser included offense of second degree robbery. He argues that the evidence that defendant used force or fear against Kinzer was weak. We are not persuaded.

"A trial court is obliged to instruct, even without a request, on the general principles of law which relate to the issues presented by the evidence. (§§ 1093, subd. (f), 1127; [citations].) When the evidence is minimal and insubstantial, there is no duty to instruct. [Citations.] The California Supreme Court recently reiterated: '[T]he existence of "*any* evidence, no matter how weak," will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.] "Substantial evidence" in this context is " 'evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]' " that the lesser offense, but not the greater, was committed.' [Citations.]" (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1410–1411.)

As discussed, robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Theft, defined in section 484 as the felonious stealing, taking, carrying, leading or driving away the personal property of another, is a lesser included offense of robbery, missing only the elements of force or fear. (*People v. Williams* (2013) 57 Cal.4th 776, 786–787; *People v. Whalen* (2013) 56 Cal.4th 1, 69.)

Fear may be inferred from the circumstances in which the crime is committed. (*People v. Cuevas* (2001) 89 Cal.App.4th 689, 698.) Evidence that the victim believed the defendant was armed is sufficient to establish fear. (See, e.g., *People v. James* (1963) 218 Cal.App.2d 166, 170 [victim's testimony that she thought robber had a gun and

robber shouted at her not to try anything or she would get hurt, sufficient to establish fear]; see also *People v. Jackson* (1967) 253 Cal.App.2d 68, 74 [victim's testimony that he gave up money because he thought the defendant had a gun and he was afraid of the defendant was sufficient to establish fear].)

"[A] robbery is not completed at the moment the robber obtains possession of the stolen property and . . . the crime of robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property. [Citations.]" (*People v. Gomez* (2008) 43 Cal.4th 249, 255.) The use of force or fear to retain property (i.e., during the asportation phase) constitutes a robbery. (*Id*. at p. 258, citing *People v. Estes* (1983) 147 Cal.App.3d 23, 26.)

Here, Kinzer testified that once he told defendant that the police were coming and that he had better leave, defendant "instantly" became "violent" and "aggressive" toward him. Kinzer said that defendant's "body language changed, shoulders, chest, fist in front of [Kinzer], speaking threatening words." Kinzer backed away from defendant; defendant snatched Kinzer's backpack and Kinzer grabbed it right back from him. Defendant then punched Kinzer twice in the ribs. Kinzer testified that he was scared and afraid for his life, explaining: "[A]t this point I had no idea of what he was going to do. I didn't know if he had a weapon, and it was clear to me that he wanted to take my bag." After being punched by defendant, Kinzer ran back into the back of the store and sat with his back against the cooler door. Once he returned to the front of the store, Kinzer was hit by defendant and defendant took off with Kinzer's backpack. There is no evidence from which a rational trier of fact could infer that the taking was anything other than a robbery and, therefore, no evidence to support an instruction on theft as a lesser included offense of robbery.

Even if we were to conclude the trial court erred in failing to instruct the jury on the lesser included offense of theft, we would find the error harmless under any standard. Kinzer's testimony was extremely strong evidence that defendant was intent upon taking his backpack with whatever force was necessary. Under these circumstances, it is not

reasonably probable (*People v. Watson* (1956) 46 Cal.2d 818, 836–837) that the jury would have concluded defendant was guilty of theft but not robbery, and further, any error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24).

D. Sentencing

Finally, defendant contends that the matter should be remanded because the trial court was "fundamentally mistaken" about the scope of its discretion. We disagree.

1. Background

The information listed two prior convictions: a prior 2007 burglary and a 2006 assault with a deadly weapon. According to the probation report, defendant received five years' formal probation for both priors. While the information utilized the prior 2007 first degree burglary conviction to allege a strike under sections 1170.12, subdivision (c)(1) and 667, subdivision (e)(1), it did not allege enhancements for prior conviction (§ 667.5, subd. (b)) or prior prison term (§ 667, subd. (a)). The 2006 assault prior was not alleged as a strike and did not otherwise factor into defendant's sentence.

At the beginning of the July 10, 2012 bifurcated proceedings on the prior convictions, the court recognized, "I'm thinking we're only dealing with one prior and that would be the 459 first, that's the probation." The prosecutor responded affirmatively and the trial court confirmed that the prosecution was not pursuing any enhancement based on the 2006 assault. The prosecutor noted and the court confirmed that "[i]t doesn't appear to add any exposure." No further evidence pertaining to the 2006 assault was produced or discussed. At the conclusion of the hearing, the trial court found beyond a reasonable doubt that defendant was the same person who had been convicted of burglary in the first degree. Thus, the court ruled that the prior had been proven and found true.

Defendant was sentenced on October 12, 2012. In discussing its tentative sentence, the court initially calculated the lowest possible sentence as nine years. The court arrived at this number by doubling the two-year mitigated term for robbery to four

years and purportedly adding "a five-year prior." The court, however, opined that it "felt like that was too much time for this particular robbery, even in light of the burglary prior." The court further noted the prosecutor had "been very gracious in agreeing to not object to a lesser sentence, because under the law, if I follow the law strictly, I can't do anything less than that nine years." The court noted that it tentatively intended to follow the prosecutor's recommendation of "something in the neighborhood of six years," which the court could arrive at by imposing the five-year aggravated term for robbery, without using the strike, and having appellant waive his "back-time" credits. Alternatively, the court noted that it could arrive at approximately the same figure by imposing the three-year "mid-term doubled with no five-year prior, so that would be three years doubled," with defendant keeping his back-time credits. The court further noted that even were it to reduce the robbery to "attempt," which was not an option "out on the table," its minimum tentative sentence would exceed six years. Defendant did not object or mention that no five-year prior had ever been pleaded or proven.

After denying defendant's new trial motion, the court proceeded to sentence him to a six-year term. The court arrived at the term by doubling the three-year middle term to six years. In imposing sentence, the court stated that it was doubling the term "pursuant to section 667[, subdivision] (a)(1)." The court also expressly stated: "I am not imposing sentence on the five-year prior. I'm simply setting that aside for the purposes of sentencing." The court confirmed that the prosecutor and defense counsel waived any "irregularities" to any "modification" in the sentence. The court did not offer any explanation for its initial tentative calculation of nine years, nor was an explanation requested by defendant.

2. Analysis

"Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than

one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) Where a trial court imposes sentence without an accurate understanding of its sentencing discretion, remand for resentencing is appropriate. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257, superseded by statute on another ground as noted in *People v. James* (2001) 91 Cal.App.4th 1147, 1149.)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 376–377.)

Our review of the record indicates the trial court understood the scope of sentencing discretion when it imposed the middle term of three years for the robbery (§§ 211, 213, subd. (a)(2)) and then doubled the term (§ 667, subd. (e)). To the extent the court referenced the prior five-year felony enhancement, it erred, as this enhancement was neither alleged in the information nor applicable in this case because defendant did not serve a prison term for his prior qualifying conviction. (See *People v. Anderson* (1995) 35 Cal.App.4th 587, 598.) Additionally, the trial court's reference to section 667, subdivision (a)(1) when doubling the middle term was erroneous, as the applicable statute for term doubling is section 667, subdivision (e). These misstatements notwithstanding, any sentencing error was harmless by any applicable standard. First, the court expressly acknowledged that it was *not* considering the purported five-year enhancement when imposing the sentence. Second, the record reflects that the court exercised its discretion

by imposing less than the 10-year sentence, which would have been the aggravated term of five years, doubled under section 667, subdivision (e). On this record, it is not reasonably probable that a different result would have been reached had the court ignored the unpled five-year prior enhancement. Finally, we conclude that any error in referencing the nonexistent prior enhancement was harmless beyond a reasonable doubt.

III. DISPOSITION

The judgment is affirmed.

_____
REARDON, J.

We concur:

_____
RUVOLO, P. J.

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RIVERA, J.